The Manitoba Court of Appeal, 2000–2004: Caseload, Output and Citations

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This article revives a series of annual pieces on the Manitoba Court of Appeal that appeared in Volumes 19 through 22 of this Journal, studying the Court through the collection and examination of statistics about various aspects of its activities. More correctly, there were three such series—one looking at "caseload and output",[1] a second looking at citation practices,[2] and a third looking at appeals from the Manitoba Court of Appeal to the Supreme Court of Canada.[3] This article shall combine a brief consideration of all three of these elements. Because it is picking up on these themes after a silence of more than a decade, I will be considering not a single year but four successive terms (2000 through 2003 inclusive), the first four terms of the new century.[4]

The broader motivation is a profound curiosity about the work and role of the provincial courts of appeal, about what they do and how they do it. The work of the trial courts is conceptually straightforward: they represent a judicial first attempt to ascertain facts against the background of law and achieve a fair resolution of a specific dispute. The work of the Supreme Court of Canada, as a

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1 Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal 1988" (1990)19(1) M.L.J. 31; Peter McCormick, "Caseload and Output of the Manitoban [*sic*] Court of Appeal 1989" (1990) 19(3) M.L.J. 334; Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal 1990" (1992) 21(1) M.L.J. 24; Peter McCormick, "Caseload and Output of the Manitoba Court of Appeal 1991" (1993) 22(2) M.L.J. 263.

2 Peter McCormick, "Judicial Authority and the Provincial Courts of Appeal: A Statistical Investigation of Citation Practices" (1993) 22(2) M.L.J. 286.

3 Peter McCormick, "A Tale of Two Courts: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1970–1990" (1990) 19(3) M.L.J. 357; Peter McCormick, "A Tale of Two Courts II: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada, 1906–1991" (1992) 21(1) M.L.J. 1.

4 Technically, of course, the year 2000 was the last year of the 20th century, and the new century began on 1 January 2001; I trust readers will forgive the license of treating the start of the new century in this popular but incorrect way.

national high court of final appeal, is also conceptually straightforward: its function is to provide final answers on important questions of law, and to provide judicial leadership to all the lower courts. But the provincial courts of appeal occupy an important but perplexing position; they are the highest court within the province, and for most of the cases that come before them they provide the final judicial answer, but they are simultaneously an intermediate court of appeal within a larger system, and for some questions (including many of the most important) they are something of a way station on the road to the Supreme Court, to which some cases may well be proceeding regardless of the outcome. Examining and explaining this powerful and important middle role is the broader project of which this article is a segment.

I. THE COURT

The Manitoba Court of Appeal consists of seven justices (including the Chief Justice), plus two members who have elected supernumerary status. Its current membership reflects the intriguing mixture of continuity and turnover that is normally present on such a court. On the one hand, appeal court judges are normally appointed in their late forties or early fifties, which combines with a retirement age of 75 to create what is potentially a considerable tenure. One member of the Court has served for a quarter-century, another for almost two decades. But at the other end of the scale, there are three judges appointed within a thirty month period at the start of the decade. By a curious coincidence, when I first wrote about the Manitoba Court of Appeal about fifteen years ago, I would have made almost exactly the same comments, pointing to the extended service of Chief Justice Monnin on the one hand, and to the recent appointments of Philp, Twaddle and Lyon on the other. During the 1987 term, the average member of the Manitoba Court of Appeal had served on the court for just over nine years; at the start of the 2004 term, the average member of the Court (excluding supernumeraries) has served for just under eleven.

Table 1: Justices of the Manitoba Court of Appeal, 2000–2004

Justice	Appointed to S.96 Trial Court[5]	Appointed to Court of Appeal
Scott, CJ	June 28, 1985	July 31, 1990
Huband	–	February 20, 1979
Philp*	August 14, 1973	May 5, 1983[6]

[5] County Court for Justice Philp; Court of Queen's Bench for all others.

[6] Elected supernumerary status 3 August 1995.

Twaddle	–	August 22, 1985
Lyon	–	1986
Helper	October 13, 1983	June 30, 1989
Kroft*	February 20, 1979	February 1, 1993[7]
Monnin	March 23, 1984	July 26, 1995
Steel	October 3, 1995	February 28, 2000
Hamilton	July 26, 1995	July 16, 2002
Freedman	–	July 16, 2002

Boldface = members for all four full terms
Italics = retired from court during the period
* = elected supernumerary status before or during the period

One slight change in the composition of the bench is that in 1987, a bare majority of the justices had not previously served on a trial bench before their appointment to the Court of Appeal. On the current Court, that balance has shifted the other way, with a majority of the members having been elevated from the Section 96 trial bench (and the ratio jumps to 6:3 if we include the supernumerary justices). It is striking that five of the six most recent appointments to the Court have been trial judge elevations, suggesting that there is a recent trend in federal appointments favouring trial experience—although this has had less impact in Manitoba than in other provinces such as Ontario (where the trial/no trial balance is about three to one) or British Columbia (where 20 of the 21 current members—including supernumeraries—have had such experience).

II. THE CASELOAD

At present, the Court of Appeal is handing just about 150 panel decisions and about 25 chambers decisions per year, as shown in Table 2. A word should be said, however, about these figures. In the first article in the series, I was working off the statistics for reported decisions rather than total decisions; in the subsequent ones, I was working off statistics for all decisions, both reported and unreported. At present, I am relying on the reports placed on the internet by the Canadian Legal Information Institute, which receives the decisions from the registrar's office of the Manitoba Court of Appeal and posts almost all of them on-line—this "almost all" represents the first slippage, although the numerical discrepancies are small and the registrar's office believed that it was only some

[7] Elected supernumerary status 1 July 2000.

minor chambers decisions that were omitted. A second problem, however, is that CANLII has ongoing concerns about "potential legal restrictions" that keeps other decisions off the website, sometimes briefly but sometimes for more extended intervals. As a result, seven decisions from the four terms were still unavailable at time of writing (although the outcome of delays with other decisions indicates that these are not necessarily major decisions but may amount only to a single paragraph of explanation.)

Almost all of the panel decisions were by three-judge panels, only four (or an average of one per year) using a panel of five.[8] This continues a trend that has been true of all the provincial courts of appeal for several decades now (ever since the major restructuring of the 1970s)—five-judge panels are now unusual, and panels of more than five are virtually unheard of. Many provincial court of appeal websites flatly declare that three and five are the only panel sizes.

Table 2: Number of panel & chambers decisions, by term
Manitoba Court of Appeal 2001–2004

Term	Panel decisions	Chambers	Total
2000	157	23	180
2001	141	26	167
2002	138	30	168
2003	111	28	139
Total	547	107	554

A further breakdown of the caseload in terms of the major types of law is indicated in Table 3. The criminal law category is self explanatory; my preference is to take the "catch all" residual category of civil law and divide it into public law and private law segments, and then to break out the Charter cases to form their own discrete category (although almost all of them were of course criminal cases before being reclassified).

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[8] *Glenco Enterprises Ltd. v. Keller*, 2000 MBCA 7; *Moar v. Roman Catholic Church of Canada*, 2002 MBCA 12; *Manitoba (Provincial Municipal Assessor) v. Seagram Co.*, 2003 MBCA 128; *Simplot Chemical Co. Ltd. v Manitoba (Municipal) Assessor*, 2003 MBCA 129.

Table 3: Number (and success rate) of appeals to the Manitoba Court of Appeal 2000–2004

Type of case	Panel decisions	Chambers decisions
Charter	22 (36.4%)	3 (100%)
public	69 (36.2%)	36 (41.7%)
criminal	199 (49.7%)	20 (45.0%)
private	257 (35.0%)	48 (39.6%)
Total:	547 (40.4%)	107 (43.0%)

There are three striking things about these caseload figures. The first is that the total number of cases (both panel and chambers) is down significantly from ten or fifteen years ago. In 1987, the Manitoba Court of Appeal handled more than 400 cases, 300 of which were panel decisions. The two heaviest years of the four considered here do not total such a number, and even within the four year period a downward trend is evident. The "caseload crisis" that we worried about in the 1980s is apparently a thing of the past. On the other hand, my earlier speculation that a reduction in caseload might lead to at least a mildly increasing use of larger panels has proven to be far off the mark.[9]

The second thing about the caseload figures is that the balance between criminal cases and other cases has changed dramatically. In 1987, there were five provinces where the appeal court docket was primarily criminal (Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia), four provinces whose appellate docket was predominately civil (B.C., Quebec, New Brunswick and P.E.I.), and one (Newfoundland) where the numbers were equally balanced.[10] The balance of civil cases to criminal cases (even when the Charter cases are included) is now 60:40, the exact reverse of the balance in the 1980s. And the fact that these figures are drawn from four complete terms, not from a single twelve-month period, makes it less likely that we are looking at a short-term anomaly, and more likely that we are observing a permanent shift.

The third thing that is striking is the very low figure for Charter cases. Though the Charter may have redefined the role of the courts and shifted the parameters of governmental action, but there is little sign of it in the appeal court caseload. It is true that the Supreme Court docket itself is less tilted in this direction than the newspaper headlines would sometimes lead one to believe, but it is still the case that more than one case in every six considered by

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9 "Caseload and Output 1990", *supra* note 1 at 28.

10 "Caseload and Output 1987", *supra* note 1 at 35.

that Court raises a Charter question. For the Manitoba Court of Appeal, less than one case in twenty-five does so.

To fill out the details of these general categories a little more fully: about half of the Charter cases involve evidentiary and admissibility issues. The largest category of criminal appeals were sentence appeals (80), followed by violent crime (assault, aggravated assault, murder, sexual assault) cases (41). The civil law cases were mostly either family law cases (custody, access, support) with 76 examples, or contract cases (59 examples). And by far the largest category of public law cases involved matters of tax and assessment (20 examples) or of professional discipline (12).

About 40% of panel decisions are decided from the bench on the day of the hearing, and a from-the-bench decision is (not surprisingly) usually bad news for the appellant as the appeal fails about 80% of the time. In reserved decisions, appellants prevail more than half the time (53.9%). About one-quarter of appeals are reserved for one month or less, and less than 5% for more than six months.[11] Curiously, it is the first set that enjoys the highest success rate at 60%, falling just below 50% for cases reserved beyond one month.

The typical Manitoba Court of Appeal decision is not particularly long. The average panel decision includes reasons for judgment of 1996 words of text, equivalent to just under five pages of an article such as this one. There is, however a considerable range—the shortest decision was a bare six words,[12] and the longest was over 20 000 words.[13] As any statistician would caution, the average is a misleading measure for a variable that is bounded by zero on one side, and unbounded on the other—a better aggregative measure is the median (the case for which there is an equal number of longer and shorter decisions), and this is only 1140 words. The reasons given in successful appeals are on average about 70% longer than those in unsuccessful appeals (2600 to 1500), which makes intuitive sense for two different reasons. First, if the court of appeal has identified a procedural or substantive error on the part of a trial judge, then it makes sense to explain the error with some precision for the benefit of that and other trial judges, but if there was no error there is sometimes little to be explained. And second (the extreme example of the first point), there are several dozen appeals that are dismissed with some variant of the formula "the appeal is without merit and is therefore dismissed."[14]

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11 These numbers do not distinguish between cases that are reserved for decision and cases where the decision is declared with reasons to follow.

12 "The appeal is dismissed with costs." *Rodych v. Rasidescu*, 2001 MBCA 143.

13 *R. v. Lamirande*, 2002 MBCA 41.

14 The equivalent format for the Supreme Court of Canada is "The appeal is dismissed for the reasons given in the court below."

Understandably, Charter cases tend to be the longest—all but two are longer than the overall average length, and four of the ten longest decisions are Charter decisions—and criminal decisions are the shortest, pulled down by a string of formulaic dismissals.

In a study of the Supreme Court during Lamer's Chief Justiceship, I found a fascinating symmetry in the length of the reasons for judgment delivered by that court—one third were less than a thousand words in length, one third were more than ten thousand words in length, and one third fell between these two numbers. Intriguingly, there is a parallel symmetry in the length of reasons by the Manitoba Court of Appeal, albeit at a lower level—one third of the reasons for judgment in panels decisions are shorter than 250 words, one third are more than 2500 words, and one third fall in between these two numbers.

Chambers decisions are about half as long as panel decisions—about 1200 words—but they exhibit far less variation in size. Fully 90% of the panel decisions fall between 250 and 2500 words. The longest, at more than 4000 words with a full set of judicial and academic citations, was an application for leave to appeal in a tax assessment case.[15] Indeed, the property assessment question looms surprisingly large in the chambers caseload, occupying fully one-quarter of the docket and drawing one-quarter of the pages written in decisions (which I am suggesting as a crude proxy for the judicial person-hour resources expended).

III. Decisions and Disagreements

Table 4 tracks the participation of each judge in panel decisions. Ordinarily, an appeal court justice in recent years can expect to sit on about 55 panels per year (as well as about 10 chambers applications), the number being slightly lower for the Chief Justice and for the most junior members. By definition, the notional average justice can expect to deliver a decision one time in every three panel appearances but the two senior members are well over this and everyone else is under. However, one should not read too much into these numbers, because on closer investigation the tendency for the senior member of a panel to deliver the reasons is much higher for the 220 from-the-bench decisions, when it happens around 85% of the time,[16] than it is for the more substantive reserved judgments.

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[15] *Manitoba (Provincial Municipal Assessor) v. Simplot Chemical Co.*, 2002 MBCA 141.

[16] So much so that when Twaddle dissented from his colleagues in *R. v. T.(T.R.)*, 2000 MBCA 135, he delivered the 14-word decision anyway. "By a majority of two to one, myself dissenting, leave to appeal is denied."

Table 4 also tracks the extent to which panels split on a decision. The large majority of decisions by the Manitoba Court of Appeal are unanimous—more than 90%—and the same is true of the other provinces. There were minority reasons in only 39 of the Court's 540 panel decisions between 1 September 2000 and 30 June 2004, and multiple minority reasons in only two.[17] This is almost exactly half the level of disagreement exhibited by the Court a dozen years ago, when the same number of minority opinions was delivered in 1991 in only half as many panel appearances. At the time, that made the Manitoba Court of Appeal (along with that of Quebec) one of the most high-disagreement appeal courts in Canada; the current numbers put it closer to an all-province average.

Table 4: Appearances and Decision in Panel Cases, by Judge
Manitoba Court of Appeal, 2000–2004

Justice	Delivered decision[18]	Joined decision	Times Disagreed	Total Appearances
Scott	85	81	2	168
Huband	132	85	8	225
Philp*	63	93	4	160
Twaddle	54	125	10	189
Lyon	7	44	1	52
Helper	37	60	0	97
Kroft*	24	129	7	160
Monnin	42	168	9	219
Steel	56	157	3	216
Hamilton	19	58	0	77
Freedman	25	61	0	86
Total	544[19]	1061	44[20]	1649

17 *R. v S.(J.S.)*, 2001 MBCA 144, and *Lamont-Daneault v. Daneault*, 2003 MBCA 111.

18 Includes co-authored decisions.

19 Includes jointly authored decisions (4 double, 1 triple), omits per coram decisions (5).

20 Includes dissents (26), separate concurrences (17) and signed dissent by a colleague (1).

There are therefore three general statements that we can make about the level of disagreement on the Manitoba Court of Appeal. The first, as indicated above, is that the Court is no longer unusual for its high levels of disagreement, but is now closer to a national norm. The second is that the frequency of disagreement tends to correlate with seniority—it is the judges who have served for the longest who are the most ready to register formal disagreement: Twaddle, Huband and Monnin. And the link to the simple fact of seniority is all the more convincing because Twaddle and Huband were not frequent dissenters a dozen years ago, when they were more junior members of the Court.[21] The third observation is that the Chief Justice himself is an exception to the general rule of seniority linking to disagreement, in that Scott C.J.M. writes minority opinions very seldom.[22]

On average, minority reasons are slightly longer than majority reasons, 2154 words to 1996 words, for a difference of about 8%.[23] This is more true of dissents (averaging 2650 words, median 2218) than of separate concurrences (averaging about 1400, median 568). The longest dissent was Huband's 9000 words in *Macatula v. Tesssier,*[24] and the longest separate concurrence was the 6800 words written by Kroft in *R. v. Elias (D.J.)*.[25]

Minority opinions are proportionately more likely to occur in Charter cases (one in every five decisions) or public law cases (one in every ten) than they are in the criminal or private law cases that make up most of the caseload (about one in fifteen). In previous years, I was able to locate a centre of gravity for the disagreement patterns—on one occasion, disagreements occurred disproportionately often when a particular pair of judges sat together on a panel; on another, a particular judge's dissents were invariably pro-Crown—but for this four year period, there is no such clustering. Most (but not all) of the judges

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21 The link between seniority and disagreement frequency also works for the Supreme Court. See McCormick, "Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada" (1994) 5 Sup. Ct. L. Rev. (2nd series) 499.

22 In the 1980s, Monnin C.J.M. was also an infrequent dissenter; see "Caseload and Output 1987", *supra* note 1.

23 Separate concurrences are generally thought of as representing less disagreement than dissents; and of course as to the outcome, they represent no disagreement at all. For a more extended argument on why to treat both dissent and separate concurrence as exemplifying judicial disagreement, see McCormick "Blocs, Swarms and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 Osg. Hall L.J. 99.

24 2003 MBCA 31.

25 2003 MBCA 72.

express disagreement at one time or another, and these minority opinions are scattered over a variety of case types and legal issues.

IV. CITATIONS OF JUDICIAL AUTHORITY

A special feature of the judiciary is that its decisions are generally accompanied by written reasons. Indeed, the Supreme Court has recently suggested in *Sheppard*[26] that the provision of these reasons is an important part of the judicial function, a measure of accountability to the public that helps to support and to justify judicial independence. It is a further feature of those reasons that they are usually grounded in judicial authority—that is to say, the prior decisions of judges on that and other courts—in such a way as to make it clear that the judge assumes that the outcome is made more plausible and acceptable by grounding it in these prior statements. It may be that the teeth of *stare decisis* are no longer as sharp as they once were, that the boundary line between binding and persuasive precedent is shifting in recent decades,[27] but such an observation in no way undermines the basic principle involved: judges explain their decisions through written reasons grounded in prior judicial authority.

But it seems to me that the judges are giving us two different sets of information when they select the cases that they cite in support of their conclusions. The first can be penetrated by noting which specific court is being cited—whether it is the Supreme Court of Canada, or the Manitoba Court of Appeal itself, or the English Court of Appeal, or whatever. Judges cite cases because they find that specific judge of that specific court in that specific case to be a powerful, persuasive and legitimate articulator of the law, and (presumably) because they expect that the readers in their various audiences (the parties, lawyers in the province, Manitoba trial court judges, and judges in other jurisdictions) will also find them to be credible and persuasive. A tight focus on the national high court, or a preoccupation with their own prior decisions, or an openness to the ideas expressed on trial courts, or a veneration of the decisions of the English House of Lords, or a curiosity about the ideas of the United States Supreme Court—all of these will reveal themselves through the citation patterns, and tell us something about how the court perceives law, and where it goes to find law when the answers are not obvious. The second concerns the balance between recent and long-established law—that is to say, how long ago the decision in question was handed down. There will always need to be a

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26 [2002] 1 S.C.R. 869, 2002 SCC 26.

27 As evidenced, for example, in the Supreme Court's recent willingness to cite its own earlier separate concurrences and even dissents—see McCormick "Second Thoughts: Supreme Court Citation of Dissents & Separate Concurrences, 1949–1999" (2002) 81 Can. Bar Rev. 369.

balance between the tried and true—"landmark" decisions that anchor the interpretation of the law for extended periods—and the innovative. Looking at the age-spread of citations gives us some idea of whether the court is locating that balance, and where it goes to look for "new" ideas when novelty is justified.

Table 5 indicates the distribution of the judicial citations of the Manitoba Court of Appeal between 1 September 2000 and 30 June 2004. The categories are obvious, but highlight the different types of judicial authority used by the Court in different ways. The largest single set of citations is to the Supreme Court of Canada—just under one-third of all citations to judicial authority. Since the decisions of the Supreme Court clearly constitute binding precedent (as the decisions of a court to which the Manitoba Court's own decisions can be appealed), this is not surprising. The second most frequently cited court is the Manitoba Court of Appeal itself, with just under one judicial citation in every five. This too is hardly surprising; continuity is valued in the exercise of judicial authority, and courts prefer to make their decisions in a manner which is fully consistent with their own earlier decisions, or that evolves from those decisions in careful increments

Table 5: Citations of Judicial Authority, by type of court cited
Manitoba Court of Appeal Decisions, 2000–2004

Source	Number of citations	As per cent of all citations	Median age of cite
Supreme Court of Canada	982	31.2%	10
Manitoba Court of Appeal	595	18.9%	5
Other Canadian Courts of Appeal	706	22.4%	7
Canadian Trial Courts	562	17.9%	6
English courts[28]	223	7.1%	52
US courts[29]	64	2.0%	21
other countries	13	0.4%	15
Boards & tribunals	6	0.2%	5
Total	3151		8

[28] Includes 17 citations to Judicial Committee of the Privy Council.

[29] 11 citations to United States Supreme Court.

A third significant block of citations—exceeding in total those to the Manitoba Court of Appeal itself—is comprised of references to the decisions of the other Canadian courts of appeal, accounting for more than one judicial citation in every five. Table 6 further unfolds this information, identifying the specific courts and the frequency of their citation. I have argued elsewhere that it is an important feature of the Canadian judicial system that the provincial courts of appeal have evolved to a situation in which they make frequent references to each other's decisions; the same is much less true, for example, of the state courts in the United States.[30] The patterns in Table 6 repeat these basic findings, with the Ontario Court of Appeal drawing by far the largest number of citations, and the British Columbia Court of Appeal in a credible but distant second place (having displaced the Alberta Court of Appeal, which was a solid second just after World War II). These "top three" courts account for more than two thirds of all of the Manitoba Court's citations in this category.

Table 6: Citation of Other Canadian Courts of Appeal
Manitoba Court of Appeal Decisions, 2000–2004

Court	Citations	As %
Ontario Court of Appeal	285	40.4%
B.C. Court of Appeal	139	19.7%
Alberta Court of Appeal	87	12.3%
Nova Scotia Court of Appeal	43	6.1%
Quebec Court of Appeal	40	5.7%
Newfoundland Court of Appeal	40	5.7%
Saskatchewan Court of Appeal	32	4.5%
New Brunswick Court of Appeal	21	3.0%
Federal Court of Appeal	10	1.5%
PEI Court of Appeal	5	0.7%
Other[31]	4	0.5%

[30] See McCormick, "The Emergence & Evolution of Coordinate Precedential Authority in Canada: Interprovincial Citations of Judicial Authority 1920–1992" (1994) 32 Osg. Hall L.J. 271.

[31] Includes Northwest Territories Court of Appeal, Yukon Court of Appeal, and Court Martial Appeal Court.

It is at first glance curious that one citation in every six should be to the decisions of Canadian trial courts.[32] If our focus is on binding precedent, then clearly judicial authority is something that flows from higher courts to lower courts within a judicial hierarchy. But binding precedent is not the whole story of judicial authority, and to focus on it too narrowly is to misunderstand the logic of the common law, which is based as much on a conversation of equals as it is on a rigid hierarchy of authority.[33] This being the case, it is less surprising that trial courts should often be cited, or that their decisions and their quotations should be treated with the same seriousness and respect as those of their hierarchical superiors.

About one-tenth of the Manitoba Court of Appeal's judicial citations are to authorities outside Canada. Most of these—more than fifty per year—are to English authorities. Technically we should divide these into two different sets, reserving a special status to decisions of the Judicial Committee of the Privy Council, or at least to JCPC decisions from before 1949, which was until that time the highest court of appeal for Canada. But the number of these references has in recent years become vanishingly small, less than one-tenth of the English total which itself has been declining, and therefore it makes little sense to break them out as a separate category. The second set relates to the role of the English courts, topped not by the JCPC but by the House of Lords, within the English common law, and this is a relationship between Canadian courts and English courts that may have attenuated over the years but was not directly affected by either 1949 or 1982. Citations to American authorities are rare, averaging only 16 per year, only one-sixth of those to the USSC and the remainder to the state and federal courts. At one time, it was thought that the entrenchment of the Charter might make the American experience with the Bill of Rights a critical dimension of Canadian law, and generate significant linkages between American and Canadian jurisprudence in this important respect, but this has turned out not to be the case. Nor do the limited number of citations to American authority occur disproportionately in Charter decisions. Twenty years into the era of the Charter, the Manitoba Court of Appeal cites the United States Supreme Court about as often as it cites the Canadian Federal Court of Appeal, which is to say very seldom. Finally, there are a dozen citations to courts elsewhere in the world, nine of them to Australia (all but one to the High Court) and three to the New Zealand Supreme Court.

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32 Although Table 5 does not provide the further breakdown, it should be noted that just under one-quarter of these are citations of the decisions of Manitoba trial courts, and just under one-third are citations of the decisions of Ontario trial courts.

33 See e.g. H. Patrick Glenn, "The Common Law in Canada" (1995) 74 Can. Bar. Rev. 261.

All of these figures are much what they were fifteen years ago, the only exception being the decline in citations of English authorities (which used to be about twice as frequent) and an off-setting increase in citations of the Supreme Court of Canada. The numbers for the median age of citations to the various authorities suggests that the Manitoba Court of Appeal draws its most recent ideas from its own decisions, those of other courts of appeal, and trial courts; its citations of the Supreme Court of Canada tend to draw on slightly more long-standing decisions, the American citations more so, and the English citations much more so. Interestingly, the median age figures run precisely parallel to the same calculations on the full set of citations to judicial authority by the Supreme Court of Canada in calendar 2003. In both respects—the continuity in its own practice over a decade of new appointments, and the parallel with the national high court—the numbers suggest that the citations of the Manitoba Court of Appeal reflect some underlying dynamic of the modern judicial role, at least as it plays out in this country, and not some transient or idiosyncratic local pattern.

V. ACADEMIC CITATION

Contemporary judicial decisions also reflect another type of authority, namely that found in academic publications of various sorts. The purist might cavil at the use of the word "authority" in this context, but it can be defended on three grounds. First, many courts (and most notably the Supreme Court of Canada) have moved over recent decades to make much more frequent use of academic sources such as books and law journals, such that a majority of reasons for judgment contain both judicial and academic citations. Second, there is nothing in the tone or the style or the accompanying commentary for these citations to suggest that they are being treated less seriously or being accorded a lower status. And third, in a number of contexts (such as the American-style "string citations" that many Canadian courts now use fairly frequently), academic cites and judicial cites are strung together side by side in what can only be taken as "flat" lists. To be sure, judicial citations are more common and are probably generally accorded greater weight, but this still leaves space for talking about academic authority as well.

To say that some courts are making increasing use of such citations is not, of course, to say that all courts do, which leads to the question of whether or not the Manitoba Court of Appeal is doing so. The answer is: only to a limited extent. The Supreme Court of Canada, in the four and a half years of McLachlin's Chief Justiceship, has used about 7500 judicial citations and about 2000 academic citations—a judicial/academic ratio of just less than 4:1. By way of comparison, the Manitoba Court of Appeal during the slightly shorter (but completely contained) period of four full terms has used just over 3000 judicial citations and 224 academic citations—a judicial/academic ratio of about 14:1.

This could reflect the different role and caseload of the two courts, or a different attitude on the part of two different sets of judges, or a transition that is still under way—whichever it might be, the point is that the Manitoba Court of Appeal does make some use of academic citations (in about one decision in six, compared with the use of judicial citations in one decision in every two), but to a significantly lesser extent both absolutely and proportionately than does the Supreme Court of Canada.

The items included as academic citations are of the types that are listed by the Supreme Court of Canada under the rubric of "Authors cited," a new format adopted by the Court in 1985. I have broken them down into four different categories. The first is the rather traditional example of dictionaries or encyclopedias of various kinds, both those that are specifically legal in the focus and those that are used by the general public and referred to for that reason. The second is reports of various governmental and official bodies; the most common example is reports of law reform commissions, or commissions of enquiry, or royal commissions, although I would also (as does the Supreme Court) include Hansard or minutes of parliamentary committees. The third includes articles and presentations, primarily those appearing in professional journals and university law reviews, but also including presentations at professional gatherings and articles in edited collections. The fourth and final category is books, primarily academic but occasionally of a more general nature. Table 7 collects each of these types of citation, and then allocates them to the judge who made the reference.

Table 7: Academic Citations by Judge and Source Cited
Manitoba Court of Appeal Decisions, 2000–2004

Judge	Dictionaries	Reports	Articles	Books	Total
Scott		4	8	45	57
Steel	2	1	18	17	38
Monnin	3		8	11	22
Huband	4		1	14	19
Philp	2	1	5	10	18
Kroft		2	3	8	13
Freedman			2	9	11
Twaddle	4	1	4	2	11
Helper				8	8
Hamilton		1	1	6	8

Lyon		1			1
other[34]		1	4	13	18
Total	15	12	54	143	224

The first point to make is the obvious one: although the Manitoba Court of Appeal does use academic citations to support its reasons, it does so far less often than does the Supreme Court of Canada. The total number of such citations over a four year period is 224, against 3086 judicial citations. If we can describe modern courts as taking a journey from very little such citation, toward increasing amounts of such citation, then the Manitoba Court of Appeal is still in the early stages of this journey.

But the second point to make is that every single judge on the court has made some such citations; with the exception of Justices Lyon and Helper (now retired), they have all made references to several different types of these materials. The heaviest users of academic citations are Scott C.J.M. (who alone accounts for fully one third of all the citations of books), and Steel J.A. (who alone accounts for the same share of the citations of periodical literature). Between them, these two judges have made about 40% of all the court's citations of academic material.

The third point to make is that references to the academic literature occurred in decisions relating to all four of my general categories of law, although they were somewhat more frequent for Charter cases (especially with respect to periodical literature) and private law cases (especially with respect to books) than they were for public law or criminal law cases.

References to dictionaries make up about 7% of all the citations; *Black's Law Dictionary* leads with 5 references, followed by the *Oxford Dictionary* with 3. Reports (mainly reports of the Law Reform Commissions of various provinces) are comparably few in number. References to presentations and publications in periodical journals make up about one quarter of this category. The *Criminal Law Quarterly* is the journal of choice, with eight citations to six different articles; and the *Canadian Bar Review* follows with five references to five different articles. (In this respect, the Manitoba Court of Appeal differs from the Supreme Court of Canada, whose most cited journal by a margin of more than three to one is the *Canadian Bar Review*.[35]) The *Advocates' Quarterly* received three references, as did annotations in *Criminal Reports*. Only two of the citations were to American law journals—Monnin once mentioned a fifty-

[34] Includes *per coram* decisions and jointly authored reasons.

[35] See McCormick, "The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985–2004" 83 (2004) 3 Can. Bar Rev. 633.

year-old article in the *Minnesota Law Review*;[36] and Kroft once quoted a recent article in the *Harvard Civil Rights-Civil Liberties Law Review*.[37] This contrasts once again with the practices of the Supreme Court of Canada, which not only cites periodicals more often than the Manitoba Court of Appeal but also cites American journals proportionately more often as well, with about one-quarter of all citations to periodicals.[38]

Books, exclusively legal books by legal publishers directed to clearly legal subjects, are still the preferred academic citation for most of the judges on the Manitoba Court of Appeal, making up about two thirds of the total. The context in which these books are cited is illustrated by the fact that the single most cited book is Elmer A. Driedger's *Construction of Statutes* (various editions including those edited by Sullivan) with 14 references; there were three single references to other books on statutory construction, highlighting this as one of the reasons for resorting to academic authorities. Second and third place went to a set of books relating to private law topics: 10 for G.H.L. Fridman, *Law of Contracts in Canada* (various editions) and 6 for S.M. Waddams *The Law of Contracts* various editions. Peter Hogg's *Constitutional Law of Canada*, by far the favourite single book of the Supreme Court of Canada, was cited only four times.

THE MANITOBA COURT OF APPEAL IN THE CANADIAN CONTEXT

The fact that the provincial courts of appeal are all intermediate appeal courts within the broader Canadian system provides an obvious point of comparison. One of the functions of the Supreme Court of Canada is to play a supervisory role with respect to the provincial courts of appeal; although the role is not reducible to simple error correction, there is still a sense in which the caseload of the Supreme Court itself can tell us something about the way that a particular provincial court of appeal fits into the broader Canadian legal framework.

The first question is simply how often a decision of a provincial court of appeal is appealed, which can serve as a very imperfect measure of litigant dissatisfaction accompanied by some reasonable expectation of vindication. The figures in Table 8 suggest that the Manitoba Court of Appeal is not appealed

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[36] The intriguingly entitled paper by Alan Wright, "The Doubtful Omniscience of Appellate Courts" in (1957) 41 Minn.L.Rev. 751, cited in *Macatula v. Tessier*, 2002 MBCA 31.

[37] Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L.L.Rev. 105, cited in *R. v. Ducharme*, 2004 MBCA 29. [typo in the Kroft citation has been corrected].

[38] McCormick, "The Judges and the Journals", *supra* note 35.

unusually often; a rough calculation from all-province totals suggests that the Supreme Court reviews roughly 2% of all provincial appeal court decisions (slightly lower for Ontario, slightly higher for Newfoundland and Labrador), and Manitoba is right on the all-province average.[39]

The second question is how often the Supreme Court intervenes in the decision of the court of appeal—that is to say, how often the appeal succeeds[40]—and this is also addressed by the figures in Table 8. This happens in 42.9% of all appeals from provincial courts of appeal, but slightly less (40.0%) in appeals from the Manitoba Court of Appeal. This represents an improvement from an early study, reviewing 40 years of appeals to the Supreme Court of Canada, over which period the Manitoba Court of Appeal was one of the three most frequently reversed courts, more than eight percentage points above the all-province average.[41] The numbers are of more than academic interests because Manitoba is the province in which a provincial chief justice was forced out of office because of the damage done to the court's reputation by a string of reversals.[42] Currently, the Manitoba Court of Appeal is faring about as well as the very powerful Ontario Court of Appeal at the hands of the Supreme Court.

Table 8: Success rates on appeal, by province
Supreme Court of Canada Decisions January 2000 to June 2004

Court	Appeals from	Allowed	Success rate
Saskatchewan C.A.	9	3	33.3%
Quebec C.A.	69	25	36.2%
Ontario C.A.	88	34	38.6%
***Manitoba* C.A.**	**15**	**6**	**40.0%**
Newfoundland C.A.	14	6	42.9%
Alberta C.A.	25	12	48.0%

[39] This is, of course, not truly a single variable but rather a composite of two different variables—how often litigants apply for leave to appeal, and how often that leave is granted—but it does serve to suggest that there is nothing unusual about the Manitoba Court in this respect.

[40] The term "interventions" used in this context is borrowed from Burton Atkins "Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States" (1990) 24 Law & Soc. Rev. 71.

[41] See Peter McCormick, "The Supervisory Role of the Supreme Court of Canada 1949–1990" (1992) 3 Sup. Ct. L. Rev. (2nd ser.) 1.

[42] See Peter McCormick & Suzanne Maisey, "A Tale of Two Courts II" (1992) 21 M.L.J. 1.

British Columbia CA	72	35	48.6%
P.E.I. C.A.	2	1	50.0%
Yukon C.A.	2	1	50.0%
Nova Scotia C.A.	6	4	66.7%
New Brunswick C.A.	8	6	75.0%
TOTAL:	310	133	42.9%

Table 9 identifies the fifteen decisions of the Supreme Court of Canada dealing with appeals from the Manitoba Court of Appeal.[43] Every member of the court except Lyon and the three members appointed since 2000 have been appealed at least once, and no member of the court has been appealed more often than three times (Helper having this distinction), and no member has been reversed more than twice (Helper again, as well as Monnin if we count the jointly authored decision in *Molodowic*). Review by the national high court is something that happens on occasion to almost everybody; it does not identify a controversial or out-lying member of the court in any way. Five of the appeals were from the decisions of divided appeals, and three of these succeeded; Huband twice (in *Molodowic* and *Catcheway*) and Twaddle once (in *V.C.A.S.*) had what must be the special satisfaction of being affirmed in the Supreme Court when they dissented from the colleagues on their own panel. To this extent, this set of appeals confirms my finding of a decade ago that appeals to the Supreme Court are more likely to succeed if they are from a divided panel; they also confirm the accompanying finding that they are more likely to succeed if they are appeals from a provincial appeal court decision upholding, rather than dismissing, an appeal from a trial decision.[44]

Table 9: Appeals from the Manitoba Court of Appeal to the Supreme Court of Canada
January 2000 to June 2004

Case	MNCA cite	SCC cite	Judge	Dissent?	Result
R. v Proulx	[1997] M.J.563 (QL)	2000 SCC 5	Helper	no	All
R. v Bunn	AR96-30-02620	2000 SCC 9	Kroft	no	Dis

[43] There was also one Supreme Court decision, *R. v. Mentuck*, 2001 SCC 76, dealing with a publication ban, that was appealed directly from the Manitoba Court of Queen's Bench to the Supreme Court.

[44] See McCormick, "Supervisory Role".

R. v R.A.R.	[1997] M.J.539 (QL)	2000 SCC 8	per coram	no	All
R. v Molodowic	[1998] M.J.247 (QL)	2000 SCC 16	Philp & Monnin	Huband	All
Reference Re Gruenke	[1998] M.J.549 (QL)	2000 SCC 32	Scott	no	Dis
R. v Catcheway	[1999] M.J. 42 (QL)	2000 SCC 33	Helper	Huband	All
R. v Starr	[1998] M.J. 80 (QL)	2000 SCC 44	Monnin	Twaddle	All
Winnipeg C.F.S. v K.L.W.	[1998] M.J.254 (QL)	2000 SCC 48	Huband	no	Dis
R. v Pakoo	2000 MBCA 109	2001 SCC 28	Philp	Kroft	Dis
R. v Khan	[1999] M.J.278 (QL)	2001 SCC 86	per coram	no	Dis
R. v V.C.A.S.	2001 MBCA 85	2002 SCC 36	Helper	Twaddle	Dis
Siemens v Man.	2000 MBCA 152	2003 SCC 3	Twaddle	no	Dis
R. v Willis	AR 01-30-05199	2003 SCC 12	Kroft	no	Dis
R. v Buhay	2001 MBCA 70	2003 SCC 30	Huband	no	All
R. v Blais	2001 MBCA 55	2003 SCC 44	Scott	no	Dis

It is striking that although criminal cases no longer dominate the Manitoba appellate caseload, they overwhelm the ranks of appeals beyond the Manitoba Court. Only one case (*Siemens*)[45] has no criminal law dimension and only two (*K.L.W.* and *Buhay*) raised significant Charter issues, although *Blais* (on the constitutional status of the Métis people) should perhaps also be considered a constitutional law case rather than a purely criminal one.

Six of the fifteen appeals from the Manitoba Court of Appeal divided the Supreme Court panel dealing with the appeal, the most dramatic example being *Starr* which split the Supreme Court 5-4, with a 20 000 word decision and a 12 000 word dissent. The one that is having the greatest influence, at least to the extent of being the most frequently cited, is almost certainly *Proulx*, for the reasons indicated below. And the one that is most directly relevant to constitutional law issues is *Blais*, which was one of a pair of decisions handed down on the same day by the Supreme Court to clarify the position of the Métis people under s.35 of the *Constitution Act 1982*.[46]

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[45] Dealing with the local prohibition of VLTs in the context of an argument about the federal-provincial distribution of legislative authority.

[46] The other was *R. v. Powley*, 2003 SCC 43.

Of course, the role of the Supreme Court in dealing with appeals from the provincial courts of appeal is not always (and not even primarily) a matter of error correction. The application-for-leave process is designed to identify provincial appeal court decisions that raise legal issues of national importance, not to zero in on cases in which the appeal is likely to succeed. And when an appeal does succeed, it is not necessarily because the appeal court made some simple or obvious error. A case in point is *R. v. Proulx*; the critical thing is not that Madame Justice Helper "got it wrong" but that an amendment to Criminal Code created a new form of sentence and the Supreme Court took the unusual step of hearing an appeal from sentence in order to "set out for the first time the principles that govern the new and innovative conditional sentence regime."[47] It underlines the judicial leadership function of this particular decision that it was the Supreme Court decision cited most often by the Manitoba court, two dozen times over the four years.

Another way that activities of the Supreme Court can tell us something about the stature of a provincial court of appeal is by showing us how often the Supreme Court cites them as judicial authority. As discussed above, one normally thinks of judicial authority as flowing down the judicial hierarchy, not up; therefore one would expect to see the Manitoba Court of Appeal citing the Supreme Court of Canada much more often than vice versa (and one would also expect that the same would be true of all the other provincial courts of appeal). This expectation is completely fulfilled—the Manitoba Court cites the Supreme Court more than two hundred times a year, and the Supreme Court returns the favour about a dozen times a year. However, it is important to take these dozen citations seriously. The act of citation is a sign of respect, an acknowledgment of authority and of the cogency of a particular observation or conclusion; not only appeal courts but trial courts as well are part of the great conversation of the common law. It is logically possible that the Supreme Court could be identifying lower court decisions only in order to single them out for criticism and repudiation, but in fact that is far from the case; instead, a Supreme Court citation of a lower court decision (appeal or trial) is typically couched in the same language and shows the same degree of respect and courtesy as citations to earlier decisions of the Supreme Court itself.

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[47] *R. v Proulx*, 2000 SCC 5; McLachlin C.J. for the Court, at 2.

Table 9: Citations of the Provincial Courts of Appeal by the Supreme Court of Canada
Supreme Court of Canada decisions, calendar 2003

Court	Cited by SCC	as % of total
Ontario C.A.	92	35.8%
British Columbia C.A.	54	21.0%
Quebec C.A.	38	14.8%
Alberta C.A.	22	8.6%
Nova Scotia C.A.	17	6.6%
Manitoba C.A.	*11*	4.3%
Saskatchewan C.A.	10	3.9%
New Brunswick C.A.	6	2.3%
Newfoundland C.A.	5	1.9%
P.E.I. C.A.	2	0.8%
TOTAL	257	

Supreme Court citations of provincial courts of appeal are centred on the three largest provinces, which account for more than 70% of all the examples—although the three are not quite in order, with British Columbia rather than Quebec in second place. Manitoba is well back in the second tier with only eleven citations, comparable to the ten citations accorded to Saskatchewan. These are all single citations of single cases; no case was cited a second time. Only Kroft is mentioned by name and that for the only decision from these four terms that has so far been cited by the Supreme Court of Canada. (The decision was *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, 2001 MBCA 40, cited by Iacobucci in *Odhavji Estate v. Woodhouse*, 2003 SCC 69.)

VI. SUMMARY OF FINDINGS

A statistical consideration of the Manitoba Court of Appeal over the first four terms of the new century suggests the following conclusions:

First: compared with a decade ago, the caseload of the Manitoba Court of Appeal has fallen by more than half, this decline affecting both panel decisions and chambers decisions. Figures within the four-term period suggest that this decline may be a continuing feature that has not yet levelled off. However, the Court has not taken advantage of the caseload reduction to return to a more extensive use of larger panels; in Manitoba as in other jurisdictions, the five-judge panel is reserved for extraordinary occasions—on average, once per term.

Second: the caseload decline is disproportionately in the field of criminal law; in the process, the Court's caseload has shifted from a 60:40 ratio of criminal cases to civil cases, to a 60:40 split in the other direction.

Third: the largest category comprises of appeals from sentence, family law matters, appeals from conviction for crimes of violence, and (especially if chambers decisions are included) cases involving the assessment of property for taxation.

Fourth: the success rate of appeals to the Manitoba Court of Appeal has risen slightly from the mid-30s to the low 40s. However, this increase is explained entirely by a higher rate of success for the now-less-frequent criminal cases, suggesting either that Manitoba lawyers have become more selective in their decisions to appeal, or that the Court has become more selective in its decision to grant leave.

Fifth: the rate of disagreement on the Manitoba Court of Appeal, once one of the highest among the provincial appeal courts, has fallen by about half over the last decade, although it still includes some very substantial sets of reasons being written to counter the majority decision. Disagreement is not particularly concentrated in specific types of law, and minority opinions tend to be written by the more senior members of the court (even though these individuals did not dissent particularly often when they were more junior).

Sixth: Charter cases make up only a small component of the total caseload, barely one case in every twenty-five on the docket. Although Charter decisions tend to be slightly longer than others, it could not be suggested that Charter cases make up a major element of the workload.

Seventh: the patterns in the Court's citation of judicial authorities are largely unchanged from a decade ago, save for an even greater emphasis on Supreme Court of Canada decisions and a continuing erosion of citations to English courts. Citations of American decisions are negligible, and citations of the USSC even more so as most references are to U.S. federal or state courts.

Eighth: there are only a limited number of references to academic sources (books, periodicals, reports), proportionately much fewer than is the case for the current Supreme Court of Canada. The academic references that occur are mainly to books, and mainly by a specific pair of judges (namely, Scott C.J.M. and Steel J.A.); they focus on rather different books and journals from those favoured by the SCC.

Ninth: in recent years, the Manitoba Court of Appeal has performed well in terms of appeals from its decisions to the Supreme Court of Canada. In previous decades, the Manitoba Court was among the more frequently reversed courts; now, the affirmation rate of its decisions is comparable to that of the Ontario Court of Appeal. Appeals from the Court are almost exclusively criminal law cases.

Tenth: the Manitoba Court of Appeal is not often cited by higher court; there is no indication that the Court has staked out any kind of leadership role within specific areas of law, either for the Court as a whole or for specific individuals.

The Manitoba Court of appeal remains an interesting point of access for a study of the "complex and delicate" role of a provincial appellate court in Canada. These courts are sometimes said to be the "prisoners" of the fact-finding trial courts on one side and the law-finding Supreme Court on the other,[48] but the shrinking of the Supreme Court caseload in recent years suggests that they are not in fact being squeezed particularly hard, and they still have some scope for dealing with important issues in a novel way that can ripple further—*K.L.W.*[49] and *Blais*[50] are possible examples from the terms under consideration. Statistical studies such as this one provide the foundation for a further consideration of the creative albeit contained role of intermediate courts of appeal in a hierarchical system, and elucidate an important part of the broader judicial role in this the age of judicial power.

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[48] Comments are from Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 115.

[49] *Winnipeg Child & Family Services v. K.L.W.* [1998] M.J. No. 254 (Q.L.)—dealing with the apprehension without prior judicial approval of a child at risk.

[50] 2001 MBCA 55—dealing with status of Métis people under the constitution.